SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,
Petitioner,

vs.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL.,
Respondents

BRIEF OF GEORGE A. BUTLER,

Chairman of State Democratic Executive Committee of Texas as Amicus Curiae

WRIGHT MORROW,
Counsel for Amicus Curiae

ALPHA LAW BRIEF CO., HOUSTON

TABLE OF CONTENTS

TABLE OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,
Petitioner,

vs.

S. E. ALLWRIGHT, ELECTION JUDGE, AND
JAMES J. LIUZZA, ASSOCIATE ELECTION JUDGE,
FOURTH PRECINCT OF HARRIS COUNTY, TEXAS,
Respondents

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

TO THE HONORABLE SUPREME COURT:

Now comes George A. Butler, Chairman of the State Democratic Executive Committee of Texas, and respectfully moves the court for leave to file the accompanying brief in this case as Amicus Curiae. The consent of the at-

torney for respondents has been obtained. Consent of attorneys for petitioner has not been received as of the time of the mailing of this brief.

Special reasons in support of this motion are set out in the accompanying brief.

WRIGHT MORROW,
Counsel for Amicus Curiae

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,
Petitioner,

vs.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL.,
Respondents

BRIEF OF AMICUS CURIAE

Amicus Curiae is Chairman of the State Democratic Executive Committee of Texas. This Committee is composed of one male and one female committeeman from each of the thirty-one state senatorial districts of Texas; the chairman and the members of the committee were regularly elected at the Texas State Democratic Convention held in Austin, Texas, in September, 1942. As Chairman of this committee, he is vitally interested in all matters affecting the operations and affairs of the Democratic Party in Texas, and the con-

duct of the party's primary elections out of which this suit arises.

Preliminary Statement

On May 24th, 1932, the Democratic Party of Texas, assembled in convention at Houston, Texas, unanimously adopted the following resolution:

> "Be It Resolved, that all white citizens of the State of Texas, who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations" (R. 75).

Respondents were the Presiding Judge and Associate Judge of the Democratic Primaries in Precinct 48, Harris County, Texas, on July 27, 1940, and August 24, 1940. Respondent Allwright had been elected by the Democrats of Precinct 48 as their party chairman of such Precinct; and thereafter, following party custom, was made presiding judge to hold the two primaries for the Democratic Party by the chairman of the Harris County Democratic Executive Committee (R. 76). Respondent Liuzza was appointed associate judge (R. 76). Respondents received their instructions with reference to holding such primary from the County Chairman (R. 76). All instructions to the presiding judges, assistant judges, clerks and supervisors at such primary elections came from Charles E. Kamp, Chairman of the Harris County Democratic Executive Committee, or the regulations were promulgated by the Executive Committee itself at a meeting of its membership held approximately one month before the first primary election (R. 140). The election judge conducted the election in accordance with the instructions thus received (R. 107). The Harris County Democratic Executive Committee determined how many

clerks the respondents should have (R. 107); it fixed the compensation for the election officials (R. 107). The entire expense of holding and conducting primaries in Harris County on July 27, 1940, and August 24, 1940, was borne and paid for by the Harris County Democratic Executive Committee from funds received by levying an assessment against each person whose name was placed upon the primary ballot (R. 76). After such primary elections the names of the candidates receiving the nomination were certified by the Democratic County Executive Committee to the party's State Executive Committee, which in turn certified the party's nominees to the Secretary of State, who placed their names on the general election ballot to be voted on in the general elections (R. 74). In the general elections negro electors could and did vote (R. 74, 108).

The policy of the Democratic Party is adopted at gubernational conventions (R. 126). The Executive Committee arranges the place for the meeting, the State Committee sets up a program for the temporary officers, which are usually confirmed from then on, the temporary officers put the Convention in operation, and after the Convention is over the management of the party reverts to the Executive Committee which carries out the policies adopted by the Convention (R. 124, 125). The county convention is a political unit in itself; the county convention elects its own chairman and precinct chairmen and they function as the election organization (R. 124). The Democratic Party of Texas is a political party and the Harris County Democratic Party is a subdivision of the state-wide political party (R. 140).

Question Involved

Does the Democratic Party in Texas, a voluntary association of persons of common political beliefs, have a right to

prescribe the qualifications of its membership and electors for the selection of the party's nominees for office?

Argument and Authorities

This court has previously had before it three cases arising in Texas involving the Democratic Party primary elections. In the case of NIXON v. HERNDON, 273 U.S. 536 (1927), the court had before it for consideration the attack on the constitutionality of Article 3107 of the REVISED CIVIL STATUTES, 1925, which read:

> "In no event shall a negro be eligible to participate in a Democratic party election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials shall not count the same."

This court found the above statute offensive to the FOURTEENTH AMENDMENT to the CONSTITUTION, the court pointing out that color cannot be made the basis of a *statutory* classification.

In NIXON v. CONDON, 286 U.S. 73 (1932), this court, speaking through MR. JUSTICE CARDOZO, referred to the NIXON v. HERNDON case, supra, in the opening language of its opinion and referring to Article 3017 stricken down in that decision stated: "While that mandate was in force, the negro was shut out from a share in primary elections, *not in obedience to the will of the party speaking through the party organs, but by the command of the state itself, speaking by the voice of its chosen representatives.*" (Italics ours).

In NIXON v. CONDON, supra, the court had before it a resolution adopted by the State Democratic Executive Committee limiting the right to vote in primary elections to white democrats who are qualified and none others, such

resolution having been adopted by the State Democratic Executive Committee of Texas under authority of Article 3107 (Chapter 67, Acts 1927), which article provided:

> "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

The court held that the above quoted Statute constituted a grant of power by the State to the Executive Committee which it did not otherwise possess as a mere agent of the party. The court stated: "Whatever inherent power a state political party has to determine the content of its membership resides in the state convention. Bryce, Modern Democracies, Vol. 2, p. 40." * * * "Never has the state convention made declaration of a will to bar negroes of the state from admission to the party ranks. Counsel for the respondent so conceded upon the hearing in this court. Whatever power of exclusion has been exercised by the members of the Committee has come to them, therefore, not as the delegates of the party, but as the delegates of the state. Indeed, adherence to the statute leads to the conclusion that a resolution once adopted by the Committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the Committee yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so intrenched is statutory, not inherent. If the State had not

conferred it, there would be hardly color of right to give a basis for its exercise."

In the NIXON v. CONDON case, the court expressly reserved decision on the validity of action by the Democratic Party itself in Texas which had the effect of restricting its membership to white democrats.

The issue raised and the contentions made by petitioners in the present case was finally placed directly before this court in GROVEY v. TOWNSEND, 295 U.S. 45 (1935). In that case the court had before it the resolution of the State Democratic Convention of Texas adopted May 24, 1932, which is the same resolution which was in effect at the time of the occurrences out of which the present suit arises (R. 75). Such resolution provided:

> "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations."

The court referred to its previous decisions in NIXON v. HERNDON and NIXON v. CONDON and pointed out that in those cases it had held that the denial of petitioner's right to vote in the primary election because of his race and color was state action forbidden by the Federal Constitution, but "Here the qualifications of citizens to participate in party councils and to vote at party primaries have been declared by the representatives of the party in convention assembled, and this action upon its face is not state action."

In GROVEY v. TOWNSEND it was argued, as it is argued in the present case, that the elaborate statutory provisions set up in Texas with reference to the primary elections had the effect of making the party primaries state elections as fully as general elections and had the further effect of making

those who managed the primaries state officers subject to state direction and control. In reply to this argument, the Supreme Court said:

> "While it is true that Texas has by its laws elaborately provided for the expression of party preference as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary; the expenses of it are not borne by the state, but by members of the party seeking nomination (Arts. 3108, 3116); the ballots are furnished not by the state, but by the agencies of the party (Arts. 3109, 3119); the votes are counted and the returns made by instrumentalities created by the party (Arts. 3123, 3124-5, 3127); and the state recognizes the state convention as the organ of the party for the declaration of principles and the formulation of policies (Arts. 3136, 3139)."

Likewise, in GROVEY v. TOWNSEND, petitioners made the argument, as is made in the present case, that candidates for the offices of Senator and Representative in Congress were to be chosen at the primary election in which petitioner attempted to participate, and that in Texas nomination by the Democratic Party is equivalent to election. This court replied that such facts, even if true, did not make out a forbidden discrimination, since a similar situation might exist in other states where one or another party includes a greater majority of the qualified voters.

Petitioners, in the present case, charge that in GROVEY v. TOWNSEND the record had not been fully developed and hence this court could not be governed in the present case by its previous decision in which it disposed of the contentions presently made by petitioners. In reply to this argu-

ment, we need only point out that GROVEY v. TOWNSEND came to this court on demurrer in which all of the facts alleged in plaintiff's petition were assumed as true and the allegations made by plaintiff in such cause were certainly as favorable to them in every respect as the record which they have developed in this cause.

Petitioners have placed much emphasis on UNITED STATES v. CLASSIC, 311 U.S. 299, in support of their application. The facts in that case and this are not the same. UNITED STATES v. CLASSIC involved a criminal prosecution for election fraud, and in no wise did the court in that case deny the right of a political party to regulate its membership or that of its electors in the party primary elections. The court further pointed out in the CLASSIC case that the Louisiana primaries were conducted by the state at state expense, while the court, in GROVEY v. TOWNSEND, pointed out that the Texas Democratic primary is a party primary, the expense of which is borne by the party, the ballots for which are furnished by the agencies of the party, the votes are counted and returns made by instruments of the party, and the Democratic Convention is the organ of the party for the declaration of party principles and policies.

Under the Record in the present case it is clear that the conduct of the Democratic primaries in Harris County by respondents was as agents of the Democratic Party of Texas and not as officers of the State of Texas. It is further evident that the Democratic primaries were elections conducted by the Democratic party through its party officials for the selection of the party's nominees in the general election, and that such primaries were not elections conducted by the State of Texas. By reason of such facts it is apparent that petitioners have not been denied any rights guaranteed to them under the Constitution.

We conclude by borrowing from the language of JUSTICE MCREYNOLDS in NIXON v. CONDON:

> "Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The state may not interfere. Whites may organize; blacks may do likewise. A woman's party may exclude males. This much is essential to free government."

It is respectfully urged that the judgment of the trial court and the circuit court should be affirmed.

Respectfully submitted,

WRIGHT MORROW,
Counsel for Amicus Curiae